IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.985 OF 2005

ALONG WITH

CIVIL APPLICATION NO.1518 OF 2005

Shri Shaikh Mohammed Isaq

since deceased through LRs.

Mr.Badulz Zana Mohammed Ishaque

Sheikh ...Appellant

Versus

Pune Municipal Corporation & Ors. ...Respondents

.....

Mr.Anil Singh i/b Mr.D.R.Shah for Appellant.

Mr.Pethe i/b Mr.R.G.Ketkar for Respondents.

.....

CORAM: A.M.KHANWILKAR, J.

JANUARY 13, 2006.

P.C.

1. Heard Counsel for the parties.

2. I see no reason to entertain this Second Appeal. It is not possible to overturn the finding of fact recorded by the Court below that since 1996 till the date of filing of the suit, Appellant did not secure any permission from the Respondent

Corporation for continuing the temporary structure of shed on his property. No document has been produced by the Appellant to support his plea that permission was continued even after 1996 in favour of the Appellant. In this view of the matter, no substantial question of law arises for consideration. The Appeal will have to be dismissed.

3. Counsel for the Appellant would, however, contend that notice issued to the Appellant under Section 478 of the B.P.M.C. Act was illegal. If at all, the only course open to the Respondent Corporation was to invoke authority under Section 260 of the B.P.M.C. Act. In the first place, such a plea was not taken in the plaint or before the lower Courts. It is not open for this Court to entertain contentions, which may invite adjudication of mixed question of fact and law. In that sense, this submission cannot be countenanced.

Accordingly, the Appeal is dismissed.

4. At this stage, Counsel for the Appellant submits that the structure in question is in existence since 1992 as temporary structure. He

submit that the Appellant will give undertaking to this Court to remove the structure if the Respondent Corporation is not inclined to grant further license to the Appellant for maintaining the temporary structure as permissible under Appendix Q of Development Control Rules. According to the Appellant, such application has been made to the Corporation, but no decision has been taken thereon. Counsel for the Corporation has no instructions in this behalf. He submits that Corporation has taken policy decision not to accord permission for such temporary structures in set-back areas since 1997.

5. Be that as it may, it will be open to the Appellant to make necessary application to the Corporation within two weeks from today for allowing him to continue the temporary structure of shed on his property. The Corporation on receiving such application, may consider the same within two weeks from the date of presentation and take appropriate decision as may be advised in accordance with law. This indulgence is not an expression of opinion either way with regard to the decision to be taken by the Corporation. For this

indulgence, Appellant will have to file undertaking before this Court that he will himself remove the subject structure within six weeks from today in the event, the Corporation declines permission for continuation of the temporary structure in question. The Appellant assures to abide by that undertaking to be filed in this Court within one week from today, on condition that the Corporation will take appropriate decision on the application within four weeks from today. If no application is moved by the Appellant before the Corporation within two weeks from today, it will be open to the Corporation to proceed in respect of the suit structure in accordance with law. Appellant to make such application to the City Engineer, Pune Municipal Corporation, Pune. The Corporation shall not precipitate the matter for a period of six weeks from today.

6. Appeal disposed of with the above observations.

A.M.KHANWILKAR, J.